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Federal Reserved Water Rights

The arid states of the western U.S. all have something else in common besides the scarcity of water: the federal government has large holdings of land within these states which are claimed to require a sufficient amount of water to fulfill the intended purpose of these reserved lands. A number of these federal claims are now being pursued and are creating conflicts between historic users of water, states and the federal government.

Known as “federal reserved water rights,” the federal government’s claim to a state’s water stems from its authority to set aside reservations of land. Reserved lands include Native American tribal reservations, National Parks, National Monuments, National Forests, wetlands, wildlife refuges, and military reservations. Many of these reservations were established in the late 1800’s to early 1900’s with settlement of Indian tribes onto reservations and the nation’s newfound sense of stewardship towards natural resources

The basic premise of reserved water rights is that the reserved lands were set aside for particular purposes and it was *implied* that these lands would have the amount of water necessary to accomplish the intended purpose of the reservation. Federal land reservations do not have to explicitly and openly state that a certain amount of water is tied to the land for a federal reserved water right to be claimed.

This issue first came to a head with Indian tribal lands when the U.S. Supreme Court ruled in the case of *Winters v. United States*, 207 U.S. 564 (1908). In the Winters case, the Gros Ventre and Assiniboine Indian tribes were settled on the Fort Belknap Indian Reservation in Montana, which a federal action set aside on May 1, 1888. The formerly nomadic tribes were put on the reservation as part of the pacification process to make them a “pastoral and civilized people” who would rely upon agriculture rather than hunting and gathering. The bands had previously wandered over a large territory that was increasingly being settled by white immigrants.

Over the course of time, white settlers began to divert the waters of the Milk River that supplied the Fort Belknap reservation and “perfected” their water rights by putting the water to beneficial use prior to the tribes doing so. A suit was filed on behalf of the tribes who now had insufficient water for agriculture and the case worked its way up through the court system until reaching the Supreme Court.

In the Winters case, the Supreme Court ruled that when the United States engages in a treaty with an Indian tribe and creates a reservation on which the tribe will settle, it

implies that sufficient water to irrigate the land is part of that reservation. The priority date of the reserved water rights is based on the date of the creation of the reservation. The tribe's water rights were recognized as having priority dates senior to the water rights of the settlers and were entitled to having their water rights satisfied before the off-reservation settlers could get water.

The "Winters Doctrine" that emerged from this ruling left a number of questions unanswered and created some thorny problems in its wake. Quantifying the amount of water necessary to fulfill the purpose of a land reservation is not a simple issue. Resolving the intent of a reservation and how much water is necessary to meet that intent are inherently difficult and subjective questions. The uncertainty of how much water will be given to the federal right during settlement of a federal reserved rights case can hang over the heads of other water users, especially in over-appropriated basins.

Another implication of federal reserved water rights is that they can remain unused for long periods or be unperfected by not having put the water to a beneficial use yet. The potential of exercising federal reserved rights from a land reservation made a long time ago can cause major disruptions in the traditional and historical management of water in a river basin.

While states have been resistant to federal sovereignty in questions of control over water inside their state, court battles and congressional action have given a measure of power back to the states. The federal government must now file water rights claims within the state court system, which then has the power to quantify these federal water claims.

Settling federal reserved water rights claims continues to be one of the hottest issues involving water in the western United States. Tribes in Arizona, New Mexico, Colorado, Montana and Oregon, among others, are embroiled in settlement disputes. Environmental groups are challenging the reserved water rights settlement reached between the Black Canyon of the Gunnison National Park and the State of Colorado in court, claiming the federal government settled for an insufficient amount of water. Federal reserved water rights will remain a contentious issue as long as water users in arid states see their use of water affected by the implementation of federal reserved water rights claims.